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Nos. 93-1612 and 93-1613

In The

Supreme Court of the United States

October Term, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., et al.,

Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, et al.,

Respondent.

EUGENE A. LUDWIG, COMPTROLLER OF THE CURRENCY, et al.,

Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, et al.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association of the principal insurance regulatory officials of the 50 states, the District of Columbia, territories and insular possessions of the United States. The NAIC is interested in filing this brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

The Executive Committee of the NAIC, which consists of seventeen insurance commissioners from all regions of the country, voted to file a brief of *Amicus Curiae* in this action, on behalf of the full NAIC membership. The interest of the NAIC in filing this brief is based on the commissioners' collective interest in retaining regulatory authority over the sales of annuities.

The insurance commissioners have been charged by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 (1994), and by their own state statutes. *See, e.g.*, TEX. INS. CODE § 1.01A(b) (NILS 1993) to regulate the business of insurance. Accordingly, insurance commissioners have consistently regulated:

- the life insurance companies that are licensed to sell annuity products;
- the development and characteristics of annuity products; and
- the agents who sell annuity products.

The insurance commissioners respectfully encourage this Court to affirm the decision of the Fifth Circuit, *VALIC v. Clarke*, 998 F.2d 1295 (5th Cir., 1993), *rehearing denied*, 13 F.3d 833 (5th Cir., 1994), so that the sale of annuities will remain within the regulatory scope of authority of the individual state insurance departments. The NAIC believes that this would be in the best interest of the public insurance consumers whom the regulators are charged to protect.

SUMMARY OF THE ARGUMENT

The decision of the Fifth Circuit in *VALIC*, 998 F.2d 1295, should be affirmed because the Fifth Circuit correctly held that Section 92 of the National Bank Act, 12 U.S.C. § 92 (1994), prohibits national banks from selling annuities in cities with more than 5,000 residents. The Section 92 insurance prohibition clearly applies to annuity sales because annuities are insurance products. Evidence that annuities are insurance products is found in the extensive compilation of insurance laws regulating annuities as insurance products, as well as the fact that annuities possess all requisite characteristics of insurance products. *See, Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L. Ed. 2d 261 (1979).

Both the district court and the Fifth Circuit considered *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984) to determine whether it would be proper to defer to the decision of the Office of the Comptroller of the

Currency (OCC), Op. OCC, unpublished (March 21, 1990), which allowed national banks to sell annuities in cities of any size. However, the district court's *Chevron* analysis was faulty. *VALIC v. Clarke*, 786 F. Supp. 639 (S.D. TX, Houston Div., 1991). Congress specified in Section 92 that bank sales of insurance should be limited to small towns. Therefore, the OCC's decision, and the district court's deference to that decision, frustrated Congressional intent by authorizing national bank sales of annuities in cities with more than 5,000 residents.

Although Petitioners argue that annuity sales were incidental and necessary to the business of banking, Congress has not specified this. *See*, 12 U.S.C. § 24 (Seventh) (1994). Additionally, there is no evidence to support such a claim.

Finally, Petitioner NationsBank argued that the Fifth Circuit erred by failing to consider the Glass-Steagall Act, 12 U.S.C. §§ 347a, 347b, 412 (1994). That Act, however, was never at issue in this case, because the OCC never relied on it. Op. OCC (March 21, 1990).

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT SECTION 92 OF THE NATIONAL BANK ACT PROHIBITS NATIONAL BANKS FROM SELLING INSURANCE IN CITIES WITH MORE THAN 5,000 RESIDENTS

Section 92 of the National Bank Act, 12 U.S.C. § 92 (1994), was enacted in 1916 and its validity was recently affirmed by this Court in *U.S. National Bank of Oregon v.*

Independent Insurance Agents of America, 113 S.Ct. 2173, 124 L. Ed. 2d 402 (1993). Section 92 grants national banks authority to "act as the agent for any fire, life or other insurance company . . . by soliciting and selling insurance and collecting premiums on policies issued by" insurance companies when the banks are "located and doing business in any place the population of which does not exceed five thousand inhabitants." 12 U.S.C. § 92.

The Fifth Circuit relied on the plain language of Section 92 to determine that it "explicitly authorizes national banks in towns with a population smaller than 5,000 to act as insurance agents." *VALIC*, 998 F.2d at 1298. As the Fifth Circuit pointed out, its earlier decision in *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir., 1968) reached the same conclusion by applying the canon of statutory construction *expressio unius est exclusio alterius* meaning that "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 403 (6th ed. 1990). Applying the same canon of statutory construction in this case, the Fifth Circuit concluded that because Section 92 explicitly authorizes national banks to act as insurance agents in towns of less than 5,000, insurance sales in towns of more than 5,000 are prohibited. *VALIC*, 998 F.2d at 1298.

The Fifth Circuit noted that the Second Circuit followed this reasoning in *American Land Title Association v. Clarke*, 968 F.2d 150 (2d Cir.), *cert. denied*, 113 S.Ct. 2959 (1993). The Second Circuit reversed a Comptroller's directive that allowed national banks to act as title insurance agents in towns of more than 5,000 residents. The Second Circuit wrote: "had Congress intended to grant national banks located in towns with a large population

the authority to sell insurance, it would never have limited the grant of authority in Section 92 to national banks in locations with under 5,000 residents." *Id.* at 155.

The Fifth Circuit's decision is clearly based on sound logic, accepted rules of statutory construction, and supporting precedent. In fact, the Fifth Circuit cited several other cases that relied on the same canon of statutory construction. *VALIC*, 998 F.2d at 1298 (citations omitted). Additionally, legislative history supports the Fifth Circuit's holding that national banks may act as insurance agents only in those towns with less than 5,000 residents. *VALIC*, 998 F.2d at 1299.

II. ANNUITIES ARE INSURANCE PRODUCTS WHICH MAY NOT BE SOLD BY NATIONAL BANKS IN CITIES WITH MORE THAN 5,000 RESIDENTS

A. ANNUITIES ARE INSURANCE PRODUCTS REGULATED BY STATE INSURANCE DEPARTMENTS PURSUANT TO STATE INSURANCE LAWS

The OCC argued that it has "been charged by Congress with the oversight and regulation of national banks." OCC brief, S.Ct., p. 13 (July 1994). Subsequent language implies that this Court, therefore, should be swayed to defer to the OCC's letter ruling of March 21, 1990. *Id.* at 14. This argument ignores, however, well-established rules of deference (*See*, § III. herein) as well as the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 (1994).

In 1945, Congress enacted the McCarran-Ferguson Act which dictates that the business of insurance and

every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business. 15 U.S.C. § 1012. The declared purpose of this Act indicated that Congress concluded state regulation of the business of insurance was in the public interest. 15 U.S.C. § 1011. The McCarran-Ferguson Act authorized, and in fact required, the states to develop a complete scheme of statutes and regulations which would govern the underwriting, sales, claims, licensing, and other aspects of insurance transactions. *See, e.g.*, TEX. INS. CODE §§ 22.23, 3.33, 3.42, 3.44c, 3.49-2, 21.27, 3.28 (NILS 1988). Many of the state laws controlling annuities and the insurance companies that provide them, as well as the insurance agents who sell them, are based on NAIC model laws and regulations.

The NAIC has developed, over a period of many years, a comprehensive scheme of model statutes and model regulations to govern all lines and aspects of insurance underwriting, sales, solvency, licensing, and operations. These laws and regulations were carefully developed through a quasi-legislative process in a public forum, by insurance regulators and their staffs. These insurance experts, including attorneys, actuaries, rating experts, economists, and insurance specialists thoughtfully crafted the annuities statutes and regulations to provide maximum protection and security for purchasers of annuity contracts. The NAIC annuities models include six model regulations, a buyer's guide for annuities, annuities mortality tables, reserve valuation guidelines, and two statutes.

More specifically, the NAIC Model Variable Annuity Regulation, *NAIC Model Laws, Regulations and Guidelines,*

Vol. II, p. 250 et seq. (1994), provides requirements for: the qualifications of insurance companies to issue variable annuities; separate accounts for companies to issue variable annuities; separate accounts for reserves for benefits; filing of contracts; variable annuity contracts; nonforfeiture benefits; required reports; foreign company protections for policyholders; and qualifications of agents for the sale of variable annuities. This model has been adopted in substantial part by twenty-three states.[1] Fourteen other states have adopted similar or related legislation or regulations.[2]

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[1] ALASKA ADMIN. CODE tit. 3 §§ 28.010 to 28.190 (1973) (All variable contracts); ARK. INS. RULE & REG. 6 (1970); CAL. ADMIN. CODE tit. 10 R. 2525 to 2533.1 (1972); COLO. ADMIN. INS. REG. 4-1-1 (1994); DEL. INS. REG. 1 (1980) (All variable contracts); GA. ADMIN. COMP. ch. 120-2-22 (1969); IDAHO INS. REG. 16 [IDAPA 18.01.16] (1993) (All variable contracts); IOWA ADMIN. CODE §§ 191-31.1 to 191-31.7 (1988); KAN. ADMIN. REGS. §§ 40-15-1 to 40-15-8 (1986); 806 KY. ADMIN. REG. § 15:010 (1984); LA. INS. REG. 28 (1969); MISS. INS. REG. L A & H 78-2 (1978); MO. ADMIN. CODE tit. 20 § 400-1.020 (1985); N.C. ADMIN. CODE tit. 11 ch. 11(B) § .0302 to .0305 (1988); N.D. ADMIN. CODE §§ 45-04-02-01 to 45-04-02-08 (1986); OKLA. INS. REGS. §§ 365:10-9-10 to 365:10-9-18 (1969); P.R.R. RULE XLV (1975); S.C. INS. R. 69-12 (Part A) (1988); S.D. ADMIN. R. 20:06:07:01 to 20:06:07:08 (1986); TENN. ADMIN. COMP. ch. 0780-1-17 (1978) (All variable contracts); VA. INS. REG. 3 (Case No. INS18623) (1969); WIS. ADMIN. CODE § INS. 2.13 (1981) (All variable contracts); WYO. INS. REGS. ch. XVI.1 (1968).

[2] D.C. R. & REGS. tit. 26 § 1004 (1961); FLA. ADMIN. CODE §§ 4-10.001 to 4-10.017 (1974); ILL. ADMIN. REG. §§ 1451.10 to 1451.100 (1972) (Parts of model; applies to all variable contracts); IND. ADMIN. tit. 760 R. 7 §§ 1-7-1 to 1-7-8 (1971); ME. INS. REG. ch. 310 (1984); MD. ADMIN. CODE tit. 9 subtit. 30 ch. 42 §§ .01 to .09 (1988); MICH. ADMIN. CODE R. 500.621 to

Similarly, the Model Variable Contract Law, *NAIC Model Laws, Regulations and Guidelines*, Vol. II, p. 260 et seq. (1994), details the licensing requirements applied to domestic life insurance companies which sell variable annuities. Section 4 of this model provides that the commissioner of insurance shall have sole authority to regulate the issuance and sale of variable contracts, and to issue such reasonable rules and regulations as may be appropriate to carry out the purposes and provisions of the Act. Thirty-four states have adopted this model in substantial part[3] and another seventeen states

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500.629 (1978); MONT. CODE ANN. §§ 30-10-103 to 30-10-104 (1991); N.J. ADMIN. CODE §§ 11:4-1.1 to 11:4-1.5 (1959) (All variable contracts); N.M. INS. REGS. §§ 13-1-1 to 13-1-9 (1958); N.Y. ADMIN. CODE tit. 11 §§ 50.1 to 50.12 (Regulation 47) (1971); PA. ADMIN. CODE tit. 31 §§ 85.01 to 85.40 (1981) (Parts of model); TEX. ADMIN. CODE §§ 3.701 to 3.706 (1985); UTAH INS. R590-133 (1989).

[3] ALA. CODE §§ 27-38-1 to 27-38-6 (1986); ALASKA STAT. § 21.42.370 (1980); ARK. STAT. ANN. §§ 23-81-401 to 23-81-405 (1975); CAL. INS. CODE § 10506 (1984); COLO. REV. STAT. §§ 10-7-402 to 10-7-405 (1977); CONN. GEN. STAT. § 38a-432 (1983); DEL. CODE ANN. tit. 18 § 2932; HAW. REV. STAT. § 431:10D-118 (1988); IDAHO CODE §§ 41-1936 to 41-1939 (1971); 215 ILL. COMP. STAT. 5/245.21 to 5/245.25 (1977); IOWA CODE §§ 508A.1 to 508A.5 (1973); KY. REV. STAT. § 304.15-390 (1986); LA. REV. STAT. ANN. § 22:1500 (1976); ME. REV. STAT. ANN. tit. 24-A § 2537 (1973); MISS. CODE ANN. §§ 83-7-27 to 83-7-49 (1978); MO. REV. STAT. § 376.309 (1983); MONT. CODE ANN. §§ 33-20-601 to 33-20-606 (1989); NEV. REV. STAT. § 688A.390 (1971); N.M. STAT. ANN. § 59A-20-30 (1985); N.C. GEN. STAT. § 58-7-95 (1979); N.D. CENT. CODE §§ 26.1-33-13 to 26.1-33-17 (1985); OKLA. STAT. tit. 36 § 6061 (1973); OR. REV. STAT. §§ 733.220 to 733.230 (1973); 40 PA. CONS. STAT. § 506.2 (1974); R.I. GEN. LAWS §§ 27-32-1 to 27-32-9 (1977); S.C. CODE ANN. §§ 38-67-10 to 38-67-50 (1988); S.D. CODIFIED LAWS ANN. §§ 58-28-13 to 58-28-31 (1971); TENN. CODE ANN.

or territories have adopted related legislation or regulations.[4] The model and the similar laws adopted by the individual states are intended to apply to domestic life insurance companies involved in the sale of variable annuities.

The Standard Non-Forfeiture Law for Individual Deferred Annuities, *NAIC Model Laws, Regulations and Guidelines*, Vol. IV, p. 805 et seq. (1994), governs such specifics as non-forfeiture requirements, minimum values, computation of present value of policies, calculation of cash surrender values, calculation of paid-up annuity benefits, maturity date, disclosure of limited death benefits, inclusion of lapse time considerations, proration of values, and additional benefits. This model law has been adopted in substantial part by forty-seven states,[5]

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§§ 56-3-501 to 56-3-509 (1970); TEX. INS. CODE ANN. art. 3.75 (1985); UTAH CODE ANN. §§ 31A-5-217.5 (1992); VT. STAT. ANN. tit. 8 §§ 3855 to 3859 (1981); WASH. REV. CODE ANN. §§ 48.18A.010 to 48.18A.900 (1983); W.VA. CODE §§ 33-13A-1 to 33-13A-5 (1977); WYO. STAT. § 26-16-502 (1983).

[4] ARIZ. REV. STAT. ANN. § 20-651 (1982); D.C. CODE ANN. § 35-639 (1981); FLA. STAT. §§ 627.801 to 627.807 (1982); GA. CODE ANN. § 33-11-34 (1982); KAN. STAT. ANN. §§ 40-436 to 40-438 (1972); MD. ANN. CODE art. 48A § 362 (1973); MASS. GEN. LAWS ch. 175 § 132F (1982); MICH. COMP. LAWS § 500.925 (1974); MINN. STAT. §§ 61A.13 to 61A.21 (1978); NEB. REV. STAT. §§ 44-2201 to 44-2221 (1969); N.H. REV. STAT. ANN. §§ 408:23 to 408:34 (1977); N.J. REV. STAT. §§ 17B:28-1 to 17B:28-15 (1981); N.Y. INS. LAWS § 4240 (1984); OHIO REV. CODE ANN. § 3911.011 (1969); P.R. LAWS ANN. tit. 26 §§ 1329 to 1335 (1974); VA. CODE §§ 38.2-3113 to 38.2-3113.1 (1992); WIS. STAT. § 611.25 (1971), § 632.45 (1979).

[5] ALA. CODE § 27-15-28.1 (1984); ALASKA STAT. § 21.45.305 (1978); ARIZ. REV. STAT. ANN. § 20-1232 (1977); ARK. STAT. ANN. §§ 23-81-301 to 23-81-312 (1981); CAL. INS.

and the Virgin Islands adopted related legislation.[6]

Additionally, the NAIC has adopted an Interest-Indexed Annuity Contracts Model Regulation, NAIC Vol. II, p. 235 et seq. (1994), a Model Annuity and Deposit Fund Disclosure Regulation, NAIC Vol. II, p. 245 et seq.

CODE §§ 10168 to 10168.10 (1979); COLO. REV. STAT. §§ 10-7-501 to 10-7-510 (1977); CONN. GEN. STAT. § 38a-440 (1978); DEL. CODE ANN. tit. 18 § 2929A (1980); D.C. CODE ANN. § 35-508 (1978); GA. CODE ANN. § 33-28-3 (1982); HAW. REV. STAT. § 431:10D-107 (1988); IDAHO CODE § 41-1927A (1989); 215 ILL. COMP. STAT. 5/229.4 (1977); IND. CODE §§ 27-1-12.5-1 to 27-1-12.5-10 (1977); IOWA CODE § 508.38 (1981); KAN. STAT. ANN. § 40-428a (1978); KY. REV. STAT. § 304.15-315 (1978); LA. REV. STAT. ANN. § 22:173.1 (1991); ME. REV. STAT. ANN. tit. 24-A §§ 2541 to 2551 (1979); MD. ANN. CODE art. 48A § 408B (1980); MASS. GEN. LAWS ch. 175 § 144A (1979); MICH. COMP. LAWS § 500.4072 (1987); MINN. STAT. § 61A.245 (1979); MONT. CODE ANN. §§ 33-20-501 to 33-20-513 (1979); NEB. REV. STAT. §§ 44-407.10 to 44-407.23 (1979); NEV. REV. STAT. §§ 688A.361 to 688A.369 (1979); N.H. REV. STAT. ANN. §§ 409-A:1 to 409A:10 (1979); N.J. REV. STAT. § 17B:25-20 (1981); N.M. STAT. ANN. § 59A-20-33 (1985); N.Y. INS. LAW § 4223 (1985); N.C. GEN. STAT. § 58-58-60 (1979); N.D. CENT. CODE §§ 26.1-34-01 to 26.1-34-10 (1985); OHIO REV. CODE ANN. § 3915.073 (1983); OR. REV. STAT. §§ 743.275 to 743.295 (1977); 40 PA. CONS. STAT. § 510b (1980); R.I. GEN. LAWS §§ 27-4.4-1 to 27-4.4-12 (1993); S.C. CODE ANN. §§ 38-69-210 to 38-69-320 (1988); S.D. CODIFIED LAWS ANN. §§ 58-15-72 to 58-15-81 (1977); TENN. CODE ANN. §§ 56-36-101 to 56-36-112 (1978); TEX. INS. CODE ANN. art. 3.44b (1977); UTAH CODE ANN. § 31A-22-409 (1986); VT. STAT. ANN. tit. 8 § 3750 (1981); VA. CODE § 38.2-3220 to 38.2-3229 (1986); WASH. REV. CODE ANN. §§ 48.23.410 to 48.23.520 (1987); W.VA. CODE § 31-13-30a (1977); WIS. STAT. § 632.435 (1979); WYO. STAT. §§ 26-16-401 to 26-16-411 (1983).

[6] *See also* N.Y. ADMIN. CODE tit. 11 §§ 44.0 to 44.12 (Reg. 127) (1986); V.I. CODE ANN. tit. 22 §§ 970 to 975 (1968).

(1994), a Two-Tier Annuity Model Regulation, NAIC Vol. II, p. 247 et seq. (1994), a Modified Guaranteed Annuity Regulation, NAIC Vol. II, p. 255 et seq. (1994), Replacement of Life Insurance and Annuities Model Regulation, NAIC Vol. III, p. 613 et seq. (1994), Model Guideline Concerning the Commissioners Annuity Reserve Valuation Method, NAIC Vol. IV, p. 825 et seq. (1994), and Model Rule (Regulation) for Recognizing a New Annuity Mortality Table for use in Determining Reserve Liability for Annuities. NAIC Vol. IV, p. 821 et seq. (1994).

Collectively, these model laws and regulations and the actual state laws and regulations based on the NAIC prototypes, illustrate the comprehensive nature and detail of insurance laws and regulations governing all aspects of annuities transactions. Indeed, the Fifth Circuit noted that all fifty states currently regulate annuities under their insurance laws. *VALIC*, 998 F.2d at 1301, *citing*, state laws.[7] The complexity and inclusiveness of

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[7] ARK. STAT. ANN. §§ 23-64-102(1), (3) (1987); CAL. INS. CODE § 101 (1977); COLO. REV. STAT. § 10-1-102(7) (1990); CONN. GEN. STAT. § 38-68t(a) (1990); DEL. CODE ANN. tit. 18 § 512 (1989); FLA. STAT. ANN. § 624.602(1) (1990); GA. CODE ANN. § 33-7-4 (1990); HAW. REV. STAT. § 431:1-204 (1985); IDAHO CODE §§ 41-103, 41-312 (1977); ILL. INS. CODE ch. 73, art. I, § 4 (1982); IND. CODE §§ 27-1-2-3(s) (1986); IOWA CODE § 508.31 (1990); KAN. STAT. ANN. § 40-401 (1990); LA. REV. STAT. ANN. § 22:6(1) (West 1969); ME. REV. STAT. ANN. tit. 24-A, § 411 (1990); MD. INS. CODE ANN. Act 48A, §§ 46(1), 65 (1991); MASS. GEN. L. ch. 175, § 47(16) (1987); MICH. COMP. LAWS Ann. § 500.602 (West 1990); MINN. STAT. ANN. § 61A.01 (1986); MISS. CODE ANN. § 83-7-1 (1972); MO. REV. STAT. §§ 375.158(2), 376.010 (1968); MONT. CODE ANN. § 33-2-108(2) (1990); NEB. REV. STAT. § 44-201 (1990); NEV. REV. STAT. § 680A.110 (1988); N.H. REV. STAT. ANN. § 408:24 (1983); N.J.

these laws and regulations is an indication of the seriousness with which state insurance departments regulate annuities as part of the responsibilities delegated to them by Congress. These laws were developed specifically for sales of annuities by life insurance companies, not by banks. If national bank subsidiaries are permitted to sell annuities, as allowed by the Comptroller's decision, banks may well be circumventing the laws intended to protect those who purchase annuity contracts from insurance companies.

The plain meaning of the annuities laws and regulations found in the insurance codes of the various states indicates that annuities are insurance products governed by insurance laws and regulations which are enforced by individual insurance departments, pursuant to Congressional delegation of authority. 15 U.S.C. §§ 1011, 1012.

REV. STAT. ANN. § 17:17-1(c) (1990); N.M. STAT. ANN. § 59A-7-2 (1988); N.Y. Ins. Law § 1113(a)(2) (McKinney 1990); N.C. GEN. STAT. §§ 58-7-15(2), 58-39-15(15) (1990); N.D. CENT. CODE §§ 26.1-26-11(1), (18) (1990); OHIO REV. CODE ANN. §§ 3902.02, 3911.01 (1990); OKLA. STAT. tit. 36 § 702 (1990); OR. REV. STAT. § 731.170(2) (1990); 40 PA. CONS. STAT. § 382(a)(1) (1990); R.I. GEN. LAWS § 27-32-1(a) (1989); S.C. CODE ANN. §§ 38-1-20(7), (19) (1989); S.D. CODIFIED LAWS ANN. § 58-6-20 (1990); TENN. CODE ANN. § 56-2-201(4) (1986); TEX. INS. CODE ANN. art. 3.01, § 1 (1981); UTAH CODE ANN. § 31A-1-301(44)(d) (1991); VT. STAT. ANN. tit. 8, § 3717 (1984); VA. CODE ANN. § 38.2-602 (1986); WASH. REV. CODE § 48.11.020 (1984); W.VA. CODE § 33-1-10(a) (1988); WIS. STAT. § 71.42(3), 610.21(4) (1980); WYO. STAT. § 26-1-102(a)(xvi), (xvii), 26-16-101 (1983).

B. ANNUITIES POSSESS REQUISITE CHARACTERISTICS OF INSURANCE PRODUCTS

Furthermore, the NAIC supports the Fifth Circuit's description of annuities which summarizes the many similarities between annuities and life insurance. The Fifth Circuit properly noted that both life insurance and annuities rely on actuarial calculations of mortality risk and risk-spreading, thereby satisfying a well-established requirement that insurance include some transfer and distribution of risk. *VALIC*, 998 F.2d at 1301, *citing, Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L.Ed. 2d 261 (1979).

The Fifth Circuit wrote:

> Both life insurance and annuities transfer the economic risk of death from the policyholder to the insurance company. Life insurance protects the insured against the economic risk of the insured's dying prematurely, while an annuity contract protects the insured against the possibility of outliving her resources. By issuing numerous life insurance and annuity contracts, an insurance company spreads the risk of policyholders living longer or shorter than predicted. *VALIC*, 998 F.2d at 1301.

The OCC suggested that *Black's Law Dictionary* supports its claims that annuities have investment characteristics, not insurance characteristics. OCC brief, S.Ct., p. 26 (July 1994). The OCC failed, however, to observe that the same dictionary defines an "annuity policy" as "an *insurance* policy providing for monthly or periodic payments to insured to begin at fixed date and continue

through insured's life." BLACK'S LAW DICTIONARY 59 (6th ed. 1990) (emphasis added).

Additionally, Petitioners argued that a recent New York case found annuities to be investment products. OCC brief, S.Ct., pp. 34-35 (July 1994); NationsBank brief, S.Ct., pp. 5-6 (July 1994), *citing, New York State Ass'n. of Life Underwriters v. New York State Banking Dept.*, No. 38, 83 N.Y. 2d 353, 1994 N.Y. LEXIS 324 (Ct. App. N.Y., March 30, 1994). In that case the Court upheld a decision by the state banking department that authorized state-chartered commercial banks to purchase and sell annuities, either directly or through a subsidiary. The New York case, however, is inapplicable in the case at bar, because the New York case is based on New York banking law which applies to New York banks, not the National Bank Act which governs activities of national banks. *Id.* at 1994 N.Y. LEXIS 324 *17.

Furthermore, NationsBank argued that the New York case will give New York bank competitors an advantage over national banks. NationsBanks brief, S.Ct., p. 6 (July 1994). A competitive marketplace is clearly a benefit to consumers, however, and certainly not a legal cause for reversing the Fifth Circuit's opinion.

III. THE DISTRICT COURT IMPROPERLY DEFERRED TO THE COMPTROLLER'S DECISION

The Comptroller's challenged letter permitted NationsBank Securities, a subsidiary of NationsBank National Bank of North Carolina, to sell annuities. Op.

OCC, unpublished (March 21, 1990). Briefly, the Comptroller classified annuities as "primarily financial investments," Op. OCC (March 21, 1990) at 3, which national banks are authorized to sell under Section 24 (Seventh) and Section 92 of the National Bank Act. *Id.* at 3, 6, 7, 8. The District Court affirmed the Comptroller's letter, holding that "the Comptroller did not incorrectly interpret the controlling statutory provisions. His reasonable interpretation was no more than a 'permissible construction,' all that is required in order to secure this Court's deference." *VALIC v. Clarke*, 786 F. Supp. 639 at 642 (S.D. TX, Houston Div., 1991).

To determine whether deference should be given to the Comptroller's decision, both the District Court and the Fifth Circuit considered *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). The *Chevron* decision established the two issues that a Court must consider when reviewing a statutory interpretation made by an administrative agency:

(1) "Whether Congress has directly spoken to the precise question at issue;" and if not,

(2) "Whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43, 104 S.Ct. at 2781.

The plain language of Section 92 clearly limits insurance sales by national banks to towns with less than 5,000 inhabitants. *See*, § I. herein. Since this plain language evidences Congressional intent, the District Court erred in deferring to the OCC's contrary ruling. It is well-established that courts are obligated not to defer to an

administrative agency's interpretation of a statute if the interpretation frustrates the intent of Congress. *VALIC v. Clarke*, 998 F.2d at 1299, *citing, Presley v. Etowah County Commission*, 112 S.Ct. 820, 117 L. Ed. 2d 51 (1992); *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 831-32 (5th Cir. 1991); *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 847-848, 117 L. Ed. 2d 79 (1992); *BPS Guard Services Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991).

The Fifth Circuit Wrote:

> The district court erred in reaching the second step of the *Chevron* analysis because our interpretation of § 92 in *Saxon* was based on the plain language of the statute which exhibits Congress' clear intent to permit only banks in towns with less than 5,000 inhabitants to sell insurance products. *VALIC*, 998 F.2d at 1299.

IV. BANK SALES OF ANNUITIES ARE NOT INCIDENTAL BANK POWERS NECESSARY TO CARRY ON THE BUSINESS OF BANKING

Both the Federal Petitioners, OCC brief, S.Ct., pp. 39-44 (July 1994), and the Banking Petitioners, NationsBank brief, S.Ct., pp. 19 et seq. (July 1994), have argued that Section 24 (Seventh) of the National Bank Act authorizes bank sales of annuities. Section 24 (Seventh) grants national banks "all such incidental powers as shall be necessary to carry on the business of banking." National Bank Act, 12 U.S.C. § 24 (Seventh) (1994). The statute specifically lists the "necessary powers" that Congress envisioned: "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; . . . receiving deposits; . . . buying and selling exchange, coin, and bullion; . . . loaning money on personal security; . . . obtaining, issuing, and circulating notes. . . . " *Id.*

Selling annuities was not an incidental power specified by Congress in Section 24 (Seventh). Even if one was swayed by arguments that the sale of annuities is functionally equivalent to other authorized activities, the sale of annuities certainly could not be found to be necessary to the business of banking. Traditional banking services will not be impaired because a bank is not permitted to sell annuities. The Fifth Circuit wrote that, "even conceding arguendo that the power to sell annuities would be incidental to banking, by no stretch of the imagination can that power be deemed 'necessary.' " *VALIC*, 998 F.2d 1295 at 1302.

V. THE FIFTH CIRCUIT PROPERLY REFRAINED FROM A GLASS-STEAGALL ANALYSIS

NationsBank argued that the Fifth Circuit erred "in not reaching the Glass-Steagall Act issue given its disposition of the other issues in the case." NationsBank brief, S.Ct., p. 32 (July 1994). The Glass-Steagall Act, 12 U.S.C. §§ 347a, 347b, 412 (1994), however, was never at issue in this case. The OCC letter that was the basis for this litigation never relied on the Glass-Steagall Act as authority. Op. OCC (March 21, 1990). In fact, the OCC letter stated: " . . . since we find that brokerage of fixed annuities is a permissible activity for national banks regardless of whether fixed annuities are Glass-Steagall securities, it is unnecessary at this time to determine the status of the contracts under the Glass-Steagall Act." *Id.* at 3.

CONCLUSION

Congressional intent, as evidenced by the plain language of Section 92 of the National Bank Act, 12 U.S.C. § 92, clearly dictates that national banks shall not sell insurance in cities with more than 5,000 residents. Petitioners argued that annuities are not within the scope of the Section 92 limitation. However, annuities are insurance products, sold by life insurance companies, regulated by state insurance commissioners, and possessing requisite insurance characteristics. Therefore, the Fifth Circuit properly held that national banks are not authorized to sell annuities in towns with more than 5,000 residents. Petitioners' argument that the Fifth Circuit erred because the sale of annuities is incidental and necessary to banking is unpersuasive. For these and all other reasons detailed in this brief, the National Association of Insurance Commissioners respectfully urges the Court to affirm the decision of the Fifth Circuit.

Respectfully submitted,

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